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No. 85-1862

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. GRAALMAN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that his demotion from GM-15 to GS-13 was improper because an incorrect demotion procedure was used.

1. Petitioner managed the Research Contracts Branch of the National Cancer Institute. The agency charged that petitioner had been deficient in managing the Branch in a host of ways. Among the many instances of mismanagement on petitioner's part, the agency charged that he had inadequately monitored a major contract, the Tracor-Jitco contract, resulting in "potential unauthorized cost increases totalling $11.5 million." Pet. App. B1-B2, B3. Petitioner was demoted from the position of Supervisory Contract Specialist, GM-15, to the position of Contract Specialist, GS-13. Petitioner appealed his demotion to the Merit Systems Protection Board (MSPB).

The MSPB's presiding official concluded that petitioner's "failure with respect to the monitoring of the Tracor-Jitco contract did constitute mismanagement and/or negligence on his part" (Pet. App. B5). With respect to the many other instances of mismanagement, the presiding official found that petitioner's "litany of explanations [was insufficient] to 'excuse' his failure to correct [his] deficiencies" (*id.* at B6). Accordingly, the presiding official held that the charges against petitioner were supported by a preponderance of the evidence and that petitioner's demotion was warranted to promote the efficiency of service (*id.* at B6-B7).

The presiding official also rejected petitioner's allegation that, because he had been charged with performance-related failures, the agency's action should have been taken under the procedures established in 5 C.F.R. Pt. 432, which implements Chapter 43 of Title 5 (5 U.S.C. 4301 *et seq.*), rather than under the procedures prescribed by 5 C.F.R. Pt. 752, which implements Chapter 75 of Title 5 (5 U.S.C. 7501 *et seq.*). Part 432 sets out the procedures for adverse actions under the performance appraisal system that was developed pursuant to the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Under that new system, employees may be demoted for "unacceptable performance" of a "critical element" of the employee's position. 5 U.S.C. 4303. The MSPB reviews adverse actions taken pursuant to this system under the substantial evidence standard (5 U.S.C. 7701(c)(1)(A)). Part 752, which was left largely unchanged by the CSRA, authorizes remedial actions against employees for a variety of reasons, including generalized poor performance that does not fit within the confines of a critical element of an employee's job. A demotion under Part 752 is warranted only where it "will promote the efficiency of the service" (5 U.S.C. 7513(a))—a showing that the agency does not have to make

under Part 432—and the MSPB reviews actions taken pursuant to Part 752 under the preponderance of the evidence standard (5 U.S.C. 7701(c)(1)(B)) rather than the lesser substantial evidence standard. The presiding official found that "the sustained charges went beyond the realm of unacceptable performance [on a critical element of petitioner's position], and constituted mismanagement and/or negligence more appropriately addressed under 5 C.F.R. Part 752" (Pet. App. B8).

The court of appeals affirmed (Pet. App. A1-A5). After the presiding official issued his opinion, the court held in *Lovshin* v. *Department of the Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985) (en banc), cert. denied, No. 85-882 (Apr. 7, 1986), that agencies may pursue performance-based adverse actions under Chapter 75 as well as under Chapter 43. The panel in this case noted that it had "neither the authority * * * nor the inclination to overrule *Lovshin*" (Pet. App. A2). It also rejected petitioner's argument that his demotion was "based solely on performance that is governed by and meets the critical elements set forth for the employee's position" (*Lovshin*, 767 F.2d at 842), so that the action had to be brought under Chapter 43; the court agreed with the presiding official that petitioner's actions constituted " 'mismanagment and/or negligence' " so that his "case was properly treated as a Chapter 75 removal case" (Pet. App. A2-A3). The court also rejected petitioner's argument that the presiding official failed to make adequate findings of fact (*id.* at A4).

2. Petitioner's primary argument (Pet. 10-31) is that the Federal Circuit erred in holding in *Lovshin* that an agency may bring a performance-based action under Chapter 75 as well as under Chapter 43. Petitioner is wrong, for the reasons set forth in our opposition to the petition for a writ of

certiorari in that case.[1] This Court recently denied the petition for a writ of certiorari in *Lovshin*.[2] There is no difference between this case and *Lovshin* that makes review by this Court warranted here.[3]

Petitioner also contends (Pet. 31-39) that the court of appeals erred in rejecting his argument that the presiding official's opinion contained insufficient findings of fact. Petitioner suggests (Pet. 36-37) that the presiding official

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[1]We have sent a copy of our opposition in *Lovshin* to counsel for petitioner. In sum, as we explained in our opposition, Congress enacted the CSRA "as a relief measure for agencies" desiring to remove or demote incompetent employees (*Wells* v. *Harris*, 1 M.S.P.R. 208, 249 (1979)). An agency may remove or demote such an employee under the streamlined procedures of Chapter 43 where the employee's performance of a critical element of his job is unacceptable. But when, as here, an incompetent employee's poor performance is not reflected in unacceptable ratings on the critical elements of his job in evaluations under the performance appraisal system developed to implement the CSRA, an agency may still remove or demote such an employee. In such a case, the agency must proceed under Chapter 75 and show by a preponderance of the evidence that the adverse action promoted the efficiency of the service.

[2]Petitioner notes (Pet. 6) that a petition for rehearing was filed in *Lovshin*. Rehearing was denied on June 16, 1986 (No. 85-882).

[3]Petitioner suggests (Pet. 9) that his case falls into an exception suggested by the court in *Lovshin* because he was demoted for "performance that is governed by and meets the critical elements set forth for the employee's position" (767 F.2d at 842). He states that the court of appeals "failed to address this issue, even though it was fully briefed" (Pet. 10). Petitioner errs in both respects. The court of appeals addressed this issue (Pet. App. A2-A3), correctly concluding that the performance appraisals on which petitioner relies in making the assertion that his performance was satisfactory do not support that assertion. As the court concluded, the performance appraisals petitioner cites are irrelevant because they did not cover his negligent monitoring of the Tracor-Jitco project and many of the other instances of mismanagement by petitioner on which the agency based his demotion. In any event, whether a panel of the Federal Circuit erred in applying an exception to a rule suggested by that court en banc is not an issue warranting review by this Court.

should have mentioned that petitioner did not hire the contracting officer assigned to the Tracor-Jitco project. He also suggests (Pet. 38) that the presiding official should have discussed the other charges of mismanagement and his excuses in detail. These contentions are without merit. While the presiding official was required to make findings of fact, there is no requirement that he recite every piece of evidence he considered. Moreover, whether the presiding official in this case adequately explained his findings of fact, as the court of appeals concluded, is obviously a fact-bound question that does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of ceriorari should be denied.

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Solicitor General

JULY 1986